

Changing Rules on the Job

New sex harassment standards please bosses and workers

BY DAVID G. SAVAGE

A conservative Supreme Court ended its term this year sounding anything but.

Instead, moving aggressively to end sexual harassment, the justices told the nation's employers they must rid their ranks of abusive supervisors. Companies that fail to do so must pay the price for workplace harassment, even if they are not aware of it, the Court said.

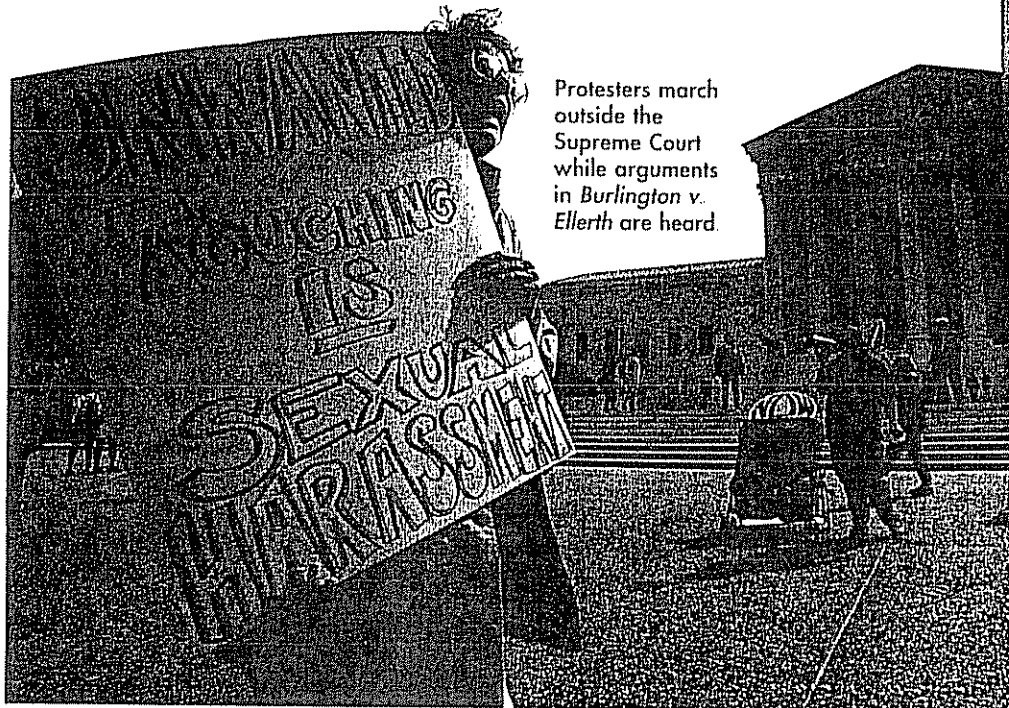
And victims of such harassment were told they could successfully sue their companies, even if they did not suffer a direct job loss and even if they failed to complain about the abuse.

Moreover, the Court opened the door to a new era of anti-discrimination protection for the millions of Americans who have a disease or physical impairment. In their first decision interpreting the Americans With Disabilities Act, the justices defined the law broadly to protect those with a disease or condition that could limit their lives, even if they display no symptoms.

The outcome on sexual harassment was surprising both for the tenor of the decisions and the broad coalition that stood behind them. Seven justices ranging from Chief Justice William H. Rehnquist on the right to Justice John Paul Stevens on the left agreed on a common framework for deciding an employer's liability for workplace harassment.

The less polarized, more pragmatic nature of this year's Court stands in contrast to that of a decade ago. Then, end-of-term opinions saw the justices divided into warring ideological factions that hurled verbal volleys across a wide divide. Now the rhetoric has cooled,

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Protesters march outside the Supreme Court while arguments in *Burlington v. Ellerth* are heard.

and the justices seem to have devoted their efforts to fashioning a reasonable solution to a difficult legal problem. As evidence of their success, the rulings were cheered both by liberal legal advocates and business lawyers.

Victory Dance

"It is a welcome change from previous years when the Court and Congress often seemed at war over civil rights laws," says Steven R. Shapiro, national legal director for the American Civil Liberties Union.

Plaintiffs attorneys at a national conference on employment law in Monterey, Calif., "danced in the aisles" when the rulings in the sex-

ual harassment cases were announced, says Cliff Palefsky, an employment lawyer from San Francisco. "In this field, big victories don't always happen," he says. "These decisions are going to compel employers to take affirmative steps to prevent harassment in the workplace."

"Having a policy on paper is not good enough," adds Richard Seymour of the Lawyers' Committee for Civil Rights Under Law.

The Court's opinions suggest that companies will have to prove they had an effective, zero-tolerance policy on employee harassment, not just words in a manual.

BETH ANN FARAGHER succeeded in getting the Court to overturn a ruling that permitted her former bosses' "frolic."



But creating a bonanza for plaintiffs lawyers is not the goal, the Court insisted. The primary objective of the anti-discrimination laws, said Justice David H. Souter, "is not to provide redress but to avoid harm."

In the short term, the rulings on sexual harassment and AIDS are likely to increase the number of lawsuits against employers. But over time, experts predict, the Court's approach may well diminish the volume of litigation by encouraging employers to adopt strong policies against harassment.

"We like this because it clarifies the law," says Robin S. Conrad, an attorney for the U.S. Chamber of Commerce. "It sets a clear, bright-line standard. It says employers must have a strong policy against sexual harassment. It must be communicated to all the employees. And they must have effective complaint procedures." Companies that take all those steps should be able to head off lawsuits, she says.

Justice Clarence Thomas, joined by Justice Antonin Scalia, decried the brave new world that his colleagues were creating. Employers simply cannot prevent all harassment in the workplace "without taking extraordinary measures—constant video and audio surveillance, for example—that would revolutionize the workplace in a manner incompatible with a free society," he wrote. Employers should be liable for a supervisor's harassment

only if they are found to be negligent, he argued.

Thomas said his reasoning applies to both sexual harassment cases decided on June 26, *Faragher v. Boca Raton*, No. 97-282, and *Burlington v. Ellerth*, No. 97-569.

In the first, Beth Ann Faragher, a former lifeguard, had sued the city of Boca Raton, Fla., because she had been subjected to lewd comments and grabbing by her beach supervisors. The 11th U.S. Circuit Court of Appeals based in Atlanta had ruled the city cannot be held liable because the supervisors were on a "frolic" of their own.

The High Court disagreed, saying the city was liable for this "misuse of supervisory authority." City Hall had "entirely failed to disseminate its policy against sexual harassment," and "made no attempt to keep track of the conduct" of its supervisors, said Souter.

In the second case, Kimberly Ellerth had sued Burlington Industries because of harassment she allegedly suffered from sales manager Ted Slowik. He advised her to "loosen up" in the office. "You know, Kim, I could make your life very hard or very easy at Burlington," Slowik is accused of saying after one business meeting.

A federal judge in Chicago had thrown out Ellerth's suit because she had no evidence she lost a promotion or suffered any retaliation for resisting the supervisor's advances. But the Supreme Court revived her suit and set it for a trial.



Kimberly Ellerth: Lack of tangible loss not a factor.

Liability Blueprint

The U.S. Supreme Court in two June sexual harassment rulings announced a three-step approach to deciding liability in future cases.

First, if a supervisor's harassment results in the victim suffering a "tangible employment action, such as discharge, demotion or undesirable reassignment," the company is always liable for paying damages.

Second, even if a victim has not suffered a job loss, the employer is still generally liable for the

harassment. The justices reasoned that because the company put the supervisor in a position of power, it should be responsible for his actions.

Third, however, the company may head off liability or significant damages for this "hostile environment" harassment by proving its innocence.

The employer must show it took "reasonable care to prevent harassing behavior," that it responded promptly to any hints of trouble, and that the plaintiff "unreasonably failed" to complain about abuse.

—David G. Savage

"Although Ellerth has not alleged she suffered a tangible employment action at the hands of Slowik, this is not dispositive," said Justice Anthony M. Kennedy. "Burlington is still subject to vicarious liability for Slowik's activity," unless the company proves it did everything possible to prevent such harassment.

Women are not the only plaintiffs who will benefit by the Court's decisions. Earlier this term in *Oncale v. Sundowner Offshore Services*, No. 96-568, the Court made clear that sexual harassment protections also apply to men, including men harassed by other men.

In the ADA case, *Bragdon v. Abbott*, No. 97-156 (June 25), the Court's broad interpretation of the disabilities law appears to protect persons with diseases such as cancer, heart disease, epilepsy and diabetes, which can be disabling as they progress.

The 5-4 ruling held that a Maine woman who was infected with the virus that causes AIDS qualified for ADA protection even though she had no symptoms of the disease.

Stricter Student Standard

But the plaintiff did not win in all the employment rulings. Rejecting a claim from a Texas schoolgirl, the Court shielded school districts from paying damages to students who are sexually abused by teachers. Unless officials knew of the abuse, the district is not liable, the Court said on a 5-4 vote in *Gebser v. Lago Vista Independent School District*, No. 96-1866.

In response, the National Women's Law Center began a letter-writing campaign to urge President Clinton and congressional leaders to amend Title IX of the education aid law to hold districts responsible for harassment by their employees.

While employment lawyers predict the Court's bright-line rulings will eventually curb sexual harassment suits, one of the decisions could revive the nation's most publicized case of alleged harassment.

In April, a federal judge in Arkansas threw out Paula Jones' lawsuit against President Clinton because she had no evidence she suffered a "tangible job detriment" for rebuffing his alleged advances. The Court's *Ellerth* decision suggests a victim of harassment can win without such evidence.